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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 560

WILLIAM J. LAVERICK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 563

MALCOLM SCHAEFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (No. 560, Pet. App. 6–19; No. 563, Pet. App. 1a–14a) is reported at 348 F. 2d 708.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1965 (No. 563, Pet. App. 15a–16a). The

time for filing petitions for writs of certiorari was extended to and including September 13, 1965, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 560:

1. Whether the court erred in admitting transcripts of telephone conversations between a government witness and petitioners, overheard and recorded by an F.B.I. agent with the consent of the government witness.

In No. 563:

2. Whether the court's summary of the evidence in its charge placed undue emphasis upon the government's case.

3. Whether the court erred in giving an instruction referring to "unlawful" and "lawful" entrapment.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner Laverick (No. 560), a government employee, was convicted of violating 18 U.S.C. 202 and 281 by accepting money paid to influence his official conduct and to secure his services relating to a matter, pending before a federal agency, in which the United States was interested. Petitioner Schaeffer (No. 563) was convicted of aiding and abetting these offenses and, along with petitioner Laverick, of conspiring to commit

them (App. 4a, 7a–13a).[1] Laverick was sentenced to two years' imprisonment on the conspiracy count, followed by suspended sentences and probation on the substantive counts (App. 5a). Schaeffer was sentenced to imprisonment for two years on the conspiracy count and one year on each of the substantive counts, all to be served concurrently (App. 5a). On appeal, the convictions were affirmed (App. 126a).

Laverick was the director of the Production Engineering Department at Fort Monmouth, New Jersey (App. 77b) and Schaeffer was a former employee of Laverick's department and later a manufacturer's representative for Consad, Inc. (App. 75a, 19b, 78b–79b), an electronic components manufacturer with a history of unsuccessful attempts to obtain government contracts (App. 62a, 18b–19b). On June 6, 1962, one Snoyer, president of Consad, telephoned Schaeffer to ask whether he could identify certain equipment involved in bids which were then pending at Fort Monmouth (App. 20b–22b). After answering Snoyer's question, Schaeffer remarked that, without the assistance of certain people at Fort Monmouth, Consad would probably be unsuccessful in the pending bidding. Schaeffer stated that, for a fee of two percent of the contract price, Snoyer could expect to receive all the approvals necessary to obtain the contract (App. 22b). Snoyer expressed a desire to meet the

[1] "App." refers to the printed appendices filed in the court below. "Tr.", preceded by a witness's name, refers to the typewritten transcript of the named witness's testimony in the trial court.

principals who could deliver the approvals, and Schaeffer arranged for him to meet with Laverick, who he said would be helpful (App. 23b–24b). Snoyer met with Schaeffer and Laverick on June 7, at which time Laverick indicated that, if Snoyer followed Schaeffer's instructions, he could expect the necessary approvals (App. 24b–25b).

Shortly after this meeting, Snoyer reported the incidents mentioned above to the F.B.I. in Washington, and on June 10, F.B.I. agents communicated with him in California (App. 25a–28a, 33a–35a, 26b, 54b, 56b). On June 11, Snoyer turned over to the agents confidential Signal Corps provision lists which had been sent to him by Schaeffer, who obtained them from Laverick (App. 28b–29b, 30b–31b, 79b–80b). At that time, Snoyer requested that the agents be present when he discussed the contract with petitioners in the future and that some record of the conversations be maintained. In response to this request, the agents offered the suggestion that they monitor and record his telephone conversations with petitioners, which Snoyer thought "was a very fine idea" (App. 36a–37a). A tape recorder, with a headset through which an agent could overhear the conversations, was connected with a telephone in an apartment rented by the F.B.I. across from Snoyer's office (Colby Tr. 2). It was decided that, when Snoyer received a call from one of the petitioners, his secretary would inform the caller that her employer was out and would call back; Snoyer would then go to the F.B.I. apartment and

return the call. Primarily under this procedure,[2] Snoyer made fifteen monitored phone calls between June 14 and July 11—thirteen to Schaeffer, one to Laverick, and one to a subordinate of Laverick, co-defendant Tryon (Colby Tr. 2–3, 15).[3]

When Snoyer complained to Schaeffer, in a telephone conversation on June 15, of a survey team's adverse report on Consad's facilities, Schaeffer replied, "Well, don't worry about that because Bill [Laverick] will overrule them" (App. 31b). In a telephone conversation on June 20, Laverick, who had the authority to overrule the survey team (App. 63a), assured Snoyer that he "still intended to overrule these people" and to give Consad "technical approval" on the contract (App. 33b–34b). In another of the telephone conversations, Schaeffer instructed Snoyer to bring $8,500 for Schaeffer and $5,000 for four other people when he next came East (App. 42a–43a, 38b, 92b). On July 12, Snoyer met with petitioners and other Fort Monmouth personnel. At that time, Snoyer showed Schaeffer the money he had brought

[2] Some of the calls, for example the one to Laverick, were entirely initiated by Snoyer (see Colby Tr. 30–38).

[3] After testifying as to the substance of these telephone conversations, Snoyer, in order to refresh his recollection, was permitted to refer to transcripts of the recordings which had been prepared by the F.B.I. (Snoyer Tr. 368–369, 372–376, 498–500). Agent Colby was permitted to read two transcripts he had prepared of conversations on June 20, 1962 between Snoyer and Tryon and between Snoyer and Laverick. The agent stated that he had made certain corrections in the transcripts, in view of his recheck of the recordings, and the court ruled that it would be best for him to read the corrected "accurate verbatim statement" (Colby Tr. 15–39).

to pay Laverick but rejected Schaeffer's request that he, rather than Snoyer, make the payments (App. 39b–40b, 45a). At the meeting, Laverick told Snoyer that he had done everything possible to procure approval of the contract and that he would provide further assistance after the contract was awarded (App. 40b–41b). Snoyer made the promised payments in bills whose serial numbers had previously been recorded by the F.B.I. (App. 42b–43b, 43a–44a). Immediately upon leaving the place where the payments were made, petitioners were placed under arrest (Laverick Tr. 70; Schaeffer Tr. 201–203).

ARGUMENT

1. The question presented in the petition in No. 560 was neither raised nor considered in the court of appeals. Except in extraordinary situations, not present here, this Court has consistently refused to consider issues tendered under these circumstances. *Husty* v. *United States*, 282 U.S. 694, 701–702; *Duignan* v. *United States*, 274 U.S. 195, 200. Nor does this question appear to have been raised in the trial court. Although admission of the transcripts of the monitored recordings was objected to, the only grounds stated in the record were the best evidence rule, hearsay, and variations on these two grounds (Colby Tr. 3–4, 9–12).[4] We submit, therefore, that the question has not been preserved for review in this Court.

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[4] After overruling these objections, the court suggested "for some enlightenment on the subject * * * in connection with eavesdropping of this kind" (Colby Tr. 13) that counsel read

In any event, petitioner's contentions are insubstantial. The admissibility of telephone conversations with a government witness, monitored and recorded with the witness's consent, is well established. See *Rathbun* v. *United States*, 355 U.S. 107; *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861; *Ferguson* v. *United States*, 307 F. 2d 787 (C.A. 10), reversed on rehearing on other grounds, 329 F. 2d 923; *Lindsey* v. *United States*, 332 F. 2d 688, 691 (C.A. 9); cf. *Lopez* v. *United States*, 373 U.S. 427. The fact that the conversations were overheard through the use of special equipment and the recordings were transcribed for use at the trial is of no significance. As the Fifth Circuit pointed out in *Carnes*, after careful analysis of the authorities: "The significant fact in the cases where eavesdropping has been approved is that a third person is listening to a conversation directly, or indirectly through an electrical device, with the consent, and often assistance, of one of the parties, and that the other party does not know that his words are overheard. Both the consenting party and the third party would be free to divulge the contents of the conversation in the courtroom or elsewhere; the only function served by the recording is to preserve a permanent and accurate record of the conversation" (295 F. 2d at 602).

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certain of the cases we cite in the next paragraph of this brief. Whether this remark was prompted by some objection of defense counsel or reflected the trial judge's prepared response to an objection which was anticipated, though never made, is unclear.

Snoyer, who consented to[5] and assisted in the recording of his conversations, personally testified as to the conversations and was available for cross-examination. The court properly permitted him to refresh his recollection of the conversations, during cross-examination, by referring to the transcripts of the recordings, even though he had not prepared the transcripts himself. They were relevant documents which did refresh his memory and which were used only for that purpose. See Wigmore, *Evidence* (3d ed.) §§ 758, 759. It was also proper to permit the monitoring agent to read from the transcripts, since these—like the recordings of which they were verbatim renditions—were "trustworthy evidence" of the conversations.[6] See *Carnes* v. *United States*, *supra*, at 602.

2. Contrary to petitioner Schaeffer's contention (No. 563, Pet. 16–19), the trial court showed no par-

[5] Contrary to petitioner's contention (No. 560, Pet. 13, n. 7), there was no evidence that Snoyer's consent was involuntary. He gave the agents written permission to record each call (*e.g.*, Snoyer Tr. 334; App. 39a), and testified that he thought making such recordings "was a very fine idea" (App. 37a). Indeed, although "the technical method of doing it" was suggested by the F.B.I., it was Snoyer himself who requested that some record of his conversations with petitioners be maintained (App. 36a–37a). Moreover, the very manner in which the calls were placed (see Statement, *supra*, pp. 4–5) evinces full accord and cooperation on Snoyer's part.

[6] There is no contention that the transcripts did not accurately reflect the recorded conversations. Petitioner Laverick consented to the omission of profanity in the reading of his conversation with Snoyer to the jury (Colby Tr. 17). Had the recording itself been played for the jury, the omission of profanity would have been extremely difficult, if not impossible.

tiality in its charge to the jury. Noting that this objection to the charge had not been made in the trial court, the court of appeals nevertheless carefully scrutinized the record and concluded (No. 560, Pet. App. 17; No. 563, Pet. App. 12a): "[I]t is abundantly clear that the court lent equal weight to both the evidence produced by the Government, as well as that produced by the defendants." (For the trial court's references to defense testimony and contentions, see, *e.g.*, App. 102a, 103a, 104a–105a, 106a–107a, 108a.) The court expressly charged that, if the jurors' recollection of the testimony was different from that of the court, they should rely upon their recollections, and that the court's only purpose in summarizing the evidence was "to associate the general tenor of it with the issues before you, to trace a sequence, a skeleton outline, the details of which are filled in by all of the testimony" (App. 109a). The court instructed that the jurors should remove from their minds any possible impression that the court was "inclined to favor the case of the Government or the case of any defendant," and it told the jury that they were the sole judges of the facts (App. 114a–115a).

3. As the court below accurately pointed out, there was no necessity for the trial court to give a charge with respect to the defense of entrapment (No. 560, Pet. App. 13; No. 563, Pet. App. 8a). The evidence showed that Snoyer had no relationship with any F.B.I. official until after petitioners had solicited from him the payment of a bribe.

In any event the instruction was not erroneous merely because it mentioned a difference between "unlawful" and "lawful" entrapment. The court charged accurately on the general principles of entrapment (App. 95a–97a) and then stated as follows (App. 97a):

> By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer to commit a crime, he is entitled to the defense of unlawful entrapment because, as I have mentioned, the law as a matter of public policy forbids a conviction in such a case, but on the other hand if a person already has the readiness and willingness to break the law, the mere fact that Government agents provided a favorable opportunity is no defense. This is lawful entrapment.

While "lawful" and "unlawful" entrapment may not be artful phraseology, there was no possibility of confusion. The charge conveyed the same idea which this Court expressed in *Sherman* v. *United States*, 356 U.S. 369, 372: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." See also *Trice* v. *United States*, 211 F. 2d 513, 516–518 (C.A. 9), certiorari denied, 348 U.S. 900.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 560

WILLIAM J. LAVERICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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